In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 171

HUGH BRYSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER.

RICHARD GLADSTEIN,
GEORGE R. ANDERSEN,
NORMAN LEONARD,
240 Montgomery Street,
San Francisco 4, California,
Counsel for Petitioner.

Subject Index

		Page
1.	The unconstitutional application of the term "affiliated" in the instant case	2
2.	The inadmissibilty of the hearsay testimony	10
3.	The two-witness perjury rule	11
4.	The prolibition against post-verdict inquiry	12
Conclusion		12

Table of Authorities Cited

Cases	Pages
American Communications Assn. v. Douds, 339 U.S. 382	9
Beaver v. Taylor, 68 U.S. 637	10
Bridges v. Wixon, 326 U.S. 135	2, 3, 4, 5
Bruce v. United States, 73 F.2d 972 (8 Cir., 1934)	10
DeJonge v. Oregon, 299 U.S. 351	5
Fiscber v. United States, 212 F.2d 441 (10 Cir., 1954)	6
Galvan v. Press, 347 U.S. 522	4, 5
Gold v. United States, 352 U.S. 985	2, 11, 13
Hartzell v. United States, 322 U.S. 680	6
Hendrix v. United States, 219 U.S. 579	12
Herndon v. Lowry, 301 U.S. 242	5
Holmgren v. United States, 217 U.S. 507	12
Hupman v. United States, 219 F.2d 243 (6 Cir., 1955); cert. den. 349 U.S. 953	8
Jaines v. Patterson, 274 U.S. 544	4
Jencks v. United States, 353 U.S. 657	1, 2, 4, 8, 12
Konigsberg v. State Bar, 353 U.S. 252	5
Mattox v. United States, 146 U.S. 140	12
Morissette v. United States, 342 U.S. 246	8
Morris v. United States, 156 F.2d 525 (9 Cir., 1946)	6
Mortenson v. United States, 322 U.S. 369	6, 8
National Labor Relations Board v. Gullett Gin Company, 340 U.S. 361	4
Oppeg v. United States, 348 U.S. 84	9, 10
Remmer v. United States, 347 U.S. 227	12
Schneiderman v. United States, 321 U.S. 118	5
Schware v. Board of Bar Examiners, 353 U.S. 232	5
Smith v. United States, 348 U.S. 147	9, 10

	Pages
Stockman v. United States, 8 F.2d 211 (9 Cir., 1925)	10, 11
Sweezy v. New Hampshire, 354 U.S. 234	7
Tot v. United States, 319 U.S. 463	8
United States v. Atkinson, 297 U.S. 157	6
United States v. Baloglinas, 177 F.2d 485 (7 Cir., 1949)	6
United States v. Kelinson, 205 F.2d 600 (2 Cir., 1953)	6
United States v. Mosarosh, 352 U.S. 1	9
United States v. Trypuc, 136 F.2d 900 (2 Cir., 1943)	6
United States v. Williams, 341 U.S. 70	4
Willis v. Eastern Trust & Banking Co., 169 U.S. 295	4
Woodward v. Leavitt, 107 Mass. 453	12
Yates v. United States, 354 U.S. 298	5, 6, 8

Constitutions

United States Constitution:	
First Amendment	6, 8
Fifth Amendment	8

Rules

Federal Rules Criminal Procedure:	
Rule 30	5, 6
Rule 52(b)	6
Rules of the Supreme Court, Rule 19(1)(b)	1

Statutes

Taft-Hartley Law, Section 9(h)	3, 4
18 USC, 1940 ed., 137	3

In the Supreme Court
OF THE
United States

October Term, 1957

No. 171

Hugh Bryson,	*Petitioner,*
vs.	
United States of America,	*Respondent.*

REPLY BRIEF FOR PETITIONER.

In its Brief in Opposition ("Br."), the Government does not assert that the Petition for Certiorari ("Pet.") does not raise important questions of federal law which ought to be decided by this Court (Supreme Court Rule 19[1][b].) Indeed, it could hardly do so in view of its earlier position in *Jencks v. United States*, 353 U.S. 657, that these identical questions required decision there even though other grounds for disposition of the case were available.[1]

[1] See Government's Supplemental Memorandum in *Jencks v. United States*, No. 23, October Term 1956 (Pet. 16, n. 19).

Nor does the Government take issue with Mr. Justice Clark's statement, made in that case, that the important question of what, under the Taft-Hartley Law, constitutes "affiliation" with the Communist Party is as yet unresolved:

> "The Court is sorely divided on this important issue and proper judicial administration requires that charges as to what constitutes membership and affiliation in the Communist Party be announced" (353 U.S. at 684).[2]

Since the questions presented are both important and undecided, it is difficult to understand how the Government can seriously oppose the granting of the writ here. In view of the pendency of other cases presenting similar issues (see Mr. Justice Clark's opinions in both *Gold* and *Joncks*, *supra*), these important and unresolved questions are bound to recur. This case presents the opportunity of disposing of them before they reach this level again.

---

1. THE UNCONSTITUTIONAL APPLICATION OF THE TERM "AFFILIATED" IN THE INSTANT CASE.

(a) The Government does not argue that illegality of purpose is not a constituent element of the relationship of affiliation. Indeed, it could hardly do so in the face of the explicit language of this Court in *Bridges v. Wixon*, 326 U.S. 135 at 143-144:

---

[2] In an earlier case, Mr. Justice Clark had remarked upon the failure of the court to settle this and related important questions (*Gold v. United States*, 352 U.S. 985 at 986).

". . . he who cooperates with such an organization only in its wholly lawful activities cannot by that fact be said as a matter of law to be 'affiliated' with it. Nor is it conclusive that the cooperation was more than intermittent and showed a rather consistent course of conduct. . . . Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities."

Rather, it asserts that petitioner's reliance on the *Wixon* definition is based upon a "mistaken analogy" between the statute involved in that case (18 USC, 1940 ed., 137), and the one here involved (§9[h] of the Taft-Hartley Law). It is difficult to understand that position, for the respective statutes read in pertinent part as follows:

8 U.S.C., 1940 ed., 137.	Section 9(h).
". . . members of or affiliated with any organization . . . that . . . advocates . . . overthrow by force and violence of the Government of the United States."	". . . a member of the Communist Party or affiliated with such party . . ."

Whatever the meaning of the word "affiliated", it is obviously the same in both statutes. The only difference is that the earlier statute *describes* the proscribed organization, whereas Section 9(h) *names* it. In each case, however, the statute denounces the same relationships and there is no basis for the view that the nature and character of the relationship of "affiliation" is any different under the more recent statute than it was under the earlier one. The most that Congress has done in Sec-

tion 9(h) is to dispense with the need for proof in every case of the Party's advocacy of forcible overthrow. *Cf. Galvan v. Press*, 347 U.S. 522, 529. However, this does not dispense with the necessity for proof that the individual was "*affiliated*" with the organization, rather than that he sustained some other relationship to it.

The use of the term "affiliated" in Section 9(h) only two years after *Wixon* had construed it as requiring proof of a connection for unlawful purposes, coupled with the fact that changes were made in other respects in this and comparable statutes (e.g., the change which dispensed with the necessity for proof of the Party's doctrine), is a clear indication of a legislative adoption of this Court's construction of that term, and may be taken as a deliberate refusal to amend or modify it. Cf. *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295; *Jaines v. Patterson*, 274 U.S. 544; *National Labor Relations Board v. Gullett Gin Company*, 340 U.S. 361; *United States v. Williams*, 341 U.S. 70.

The *Wixon* definition of "affiliated" contains *two* concepts: (a) cooperation on a fairly permanent basis, and (b) cooperation in furtherance of unlawful objectives. The Government's argument that only the first half of this definition is applicable to this case, is untenable and should be rejected by this Court.[3]

[3]We do not believe, as the Government in effect argues (Br. 10-11), that by their concurrences in *Jencks v. United States*, 353 U.S. 657, Justices Burton, Harlan and Frankfurter intended *sub silencio* to revise the Wixon definition of affiliation and to approve, for a criminal case, the elimination of the requirement that to constitute affiliation the connection must be for an unlawful purpose. Certainly nothing in their opinions suggests any such thing; on the contrary, the *Wixon* opinion is cited with approval (353 U.S. at 680, n. 10).

The Government's position nowhere considers the serious constitutional questions posed by its construction of the statute (Pet. 24-26). A criminal statute authorizing conviction for cooperation with the Communist Party to attain exclusively lawful objectives, is obviously bad when measured against the requirements of the First Amendment, even if that cooperation is "on a fairly permanent basis". Under the protections afforded by the amendment, one might cooperate quite consistently with the Communist Party in an effort to procure the passage of fair employment legislation, for example, and still not be subject to prosecution as an "affiliate" thereof. *Schneiderman v. United States*, 321 U.S. 118; *Cf. DeJonge v. Oregon*, 299 U.S. 351; *Herndon v. Lowry*, 301 U.S. 242; *Schware v. Board of Bar Examiners*, 353 U.S. 232; *Konigsberg v. State Bar*, 353 U.S. 252.[4]

Galvan v. Press, 347 U.S. 522, does not, as the Government seems to think (Br. 9-10), require a different result, since there the court was concerned (at 531) only with "[p]olicies pertaining to the entry of aliens and their right to remain here" after proof that the had been "members" of the Party. It never intimated that the result if there reached would obtain in a case involving the constitutional rights of a citizen in a criminal proceeding based upon a charge of "affiliation."

The Government's argument, that the provisions of Rule 30, F. R. Crim. P. preclude the petitioner from raising the issue, neglects to recognize: (1) that the *Wixon* case was

---

[4]Indeed, one might even be a member or officer of the Party without necessarily committing an unlawful act (cf. *Yates v. United States*, 354 U.S. 298).

repeatedly called to the attention of the trial court (Pet. 26, n. 31), and that the record here shows more than substantial compliance with the rule; and (2) that under Rule 52(b) F. R. Crim. P. this Court has inherent power to inquire into the adequacy of a charge in a case where there is grave error which may amount to a denial of a fundamental right of the accused. *United States v. Atkinson*, 297 U.S. 157; *Morris v. United States*, 156 F.2d 525 (9 Cir., 1946); *United States v. Balodimas*, 177 F.2d 485 (7 Cir., 1949); cf. *Fischer v. United States*, 212 F.2d 444, 444 (10 Cir., 1954); *United States v. Kelinson*, 205 F.2d 600 (2 Cir., 1953). Rule 52(b) is particularly applicable in view of the harshness of the sentence here imposed. *United States v. Trupiac*, 136 F.2d 900 (2 Cir., 1943).

In any case, the court below, both in its original opinion (Pet. App. 42) and on rehearing (Pet. App. 45-46) considered the claim on the merits and rejected it. Its opinions, erroneous in the respects pointed out, will therefore stand as a statement of the law unless corrected by this Court.

Finally, Rule 30, if it applies at all, applies only to claimed errors in the instructions. It does not operate to prevent an appellate court in a criminal case from examining the record to determine whether in other respects—e.g., the sufficiency of the evidence—the statute was unconstitutionally applied to the defendant. This Court has never hesitated to examine a record for this purpose (*Mortenson v. United States*, 322 U.S. 369 at 374), particularly in cases involving claimed violations of First Amendment rights (*Hartzel v. United States*, 322 U.S. 680; *Yates v. United States*, 354 U.S. 298).

(b) The Government's statement that the evidence shows petitioner's "close ties with the Communist Party and adherence to its doctrines both before and after the execution of the affidavit" (Br. 12) is palpably incorrect. Even the court below remarked on the "absence of evidence" of petitioner's participation in party affairs after 1947 (238 F.2d 661; Pet. App. 35).

There is no evidence in this record, even as summarized by the Government (Br. 5-8), that after 1947 petitioner had "close ties" or even a single contact with the Communist Party. The only evidence of petitioner's "ties" after 1947 reveals an interest in the affairs of the Progressive Party (Br. 7); this cannot, particularly after the decision of this Court in *Sweezy v. New Hampshire*, 354 U.S. 234, especially at 242, 245, 266, be regarded as evidence of Communist Party affiliation.

As to adherence to doctrine, the record is equally devoid of evidence relating to the period after 1947. Indeed, one examines the record, the opinions below, and the Government's summary of the evidence in vain to determine of just what doctrines the Government speaks. The trial court recognized that there was no evidence in this case dealing with the doctrines of the Communist Party (R. 1085-J) and observed that on the proof here adduced, the jury could have found the party to have been "a sewing circle or a social club of some kind" (R. 900-G). The Government failed to prove which, if any, "doctrines" petitioner was supposed to have adhered to even before 1947, much less after that date; it certainly did not prove adherence to unlawful "doctrines." Consequently, entirely

apart from the matter of the erroneous instruction, the conviction violated petitioner's First Amendment rights.

We have already shown (Pet. 23), and drawn no response from the Government, that there is not a scintilla of evidence to justify a finding that after 1947 petitioner had any connection with the party, much less a "close alliance" with it. The Government nonetheless continues to rely upon non-existent evidence to support an "inference" which it says the jury "presumably" drew (Br. 13) that petitioner was affiliated with the party four years after the date of his last contact with it. However, due process demands that there be a rational connection between the evidence adduced and the conclusions which are drawn therefrom, and an inference as irrational as the one the Government here proposes, raises constitutional questions under the Fifth Amendment. *Tot v. United States*, 319 U.S. 463; *Mortensen v. United States*, 322 U.S. 369; *Morissette v. United States*, 342 U.S. 246.[5]

[5]In any case, constitutional considerations aside, the four-year gap in the evidence destroys the Government's case, for here, unlike *Jencks*, there is no evidence showing that the party kept no membership records or arranged special clandestine meetings of important party officials or that no disciplinary action was taken against petitioner or that he was not replaced in a party position (*Jencks v. United States*, 353 U.S. 657, at 659-660, 662). Nor does the holding in *Hupman v. United States*, 219 F.2d 243 (6 Cir., 1955), cert. den. 349 U.S. 953, relied upon by the Government (Br. 13-14), indicate a contrary result. There appellant received specific "instructions" to conceal his membership in the party while "maintaining connection with and giving support to" it. Here there is no evidence either of the maintenance of a connection with the party or of the giving of support to it subsequent to 1947. Whatever may be one's views about the Party generally, it is upon the evidence in the record that the issues here presented must be decided. *Yates v. United States*, 354 U.S. 298 at 330.

(c) What has been said disposes, we think, of the Government's contention that because this Court said, in *American Communications Assn. v. Douds*, 339 U.S. 382 at 412-413, that "no honest, untainted interpretation" of the term "affiliated" is punishable, the term is not too vague to warrant a conviction. The Government's argument (Br. 14) begs the question because it assumes that there can be only *one* honest interpretation of the term—the one urged by the Government. The fact is that on the evidence here petitioner could have had, and for all that the Government proved did have, an honest, untainted interpretation of the term consistent with non-affiliation when he signed the affidavit in 1951. He was convicted because a jury had a different interpretation—perhaps equally honest and untainted—of the term. The fact that this occurred points up the vagueness of the statute upon which the Government procured this conviction.

(d) The argument (Br. 15) that the witness Whitelaw related the alleged 1951 admission to the Federal Bureau of Investigation on August 6, 1951, is directly contrary to the testimony given by this witness in a Federal court proceeding on October 18, 1951. On that occasion he swore that he had never before told "anybody" that such a conversation had occurred (R. 606). Whether the witness' entire testimony is thereby "tainted" within the meaning of *United States v. Mesarosh*, 352 U.S. 1, may be an open question, but the Government's ignoring of this flagrant contradiction in the testimony of one of its key witnesses is too obvious to be overlooked here.

While *Opper v. United States*, 348 U.S. 84, and *Smith v. United States*, 348 U.S. 147, did in fact involve extra-

judicial admissions made to law enforcement officers, they did not, as the Government suggests (Br. 15), imply that this narrow fact is the basis for the rule that such admissions must be adequately corroborated. *Smith* stresses (348 U.S. at 155) that any admission of "importance" should not go uncorroborated; and *Opper* points out that not only the over-zealousness of law enforcement agents, but also "the maliciousness of an enemy . . . may tinge or warp the facts of a confession" (348 U.S. at 89-90). There is no reason for limiting the rule requiring corroboration in the manner suggested by the Government.

---

2. THE INADMISSIBILITY OF THE HEARSAY TESTIMONY.

The Government argues that the admittedly hearsay testimony (vital to its case as the basis for the argument that there was a party "policy" to file false affidavits) is admissible on the theory of "testimonial completeness" (Br. 18). It ignores the fact, however, that the "principal fact" which may be thus "illuminated" was not petitioner's state of mind in 1947, but his state of mind when he filed the affidavit in 1951, four years later. We have already considered *Beaver v. Taylor*, 68 U.S. 637, and shown its inapplicability to the case at bar (Pet. 30). Neither *Bruce v. United States*, 73 F.2d 972 (8 Cir., 1934), nor *Stockman v. United States*, 8 F.2d 211 (9 Cir., 1925), also cited by the Government (Br. 18), support the Government on this point. *Bruce* was a prosecution for illegally transporting a motor vehicle in interstate commerce. The challenged evidence had to do with checks given to service stations in payment for gasoline purchased *on*

the very trip involved in the prosecution, and revealed "circumstances [which were] all closely connected with the transportation of the car" (73 F.2d at 974). *Stockman* was a prosecution for the maintenance of a nuisance between December of 1923 and June of 1924. The challenged evidence was a conversation respecting illegal liquor sales in May of 1924—squarely within the period charged in the information. It was held to be admissible because it was "contemporaneous with the facts in controversy" (8 F.2d at 212).[6]

In no case cited by the Government has hearsay testimony *four years old* been held admissible to prove a crime. This 1947 hearsay testimony, so vital to the Government's case, was improperly admitted since it could not possibly prove petitioner's state of mind in 1951.

---

3. THE TWO-WITNESS PERJURY RULE.

For the reasons already asserted (supra, pp. 5-6), we believe that the Government's reliance (Br. 19) on F.R. Crim. P. 30 to foreclose review by this Court of the applicability of the two-witness perjury rule to a prosecution under the false statements statute, is misplaced. As to the importance of the question, we call attention to Mr. Justice Clark's observations in *Gold v. United States*, 352 U.S. 985 at 986. On the merits, we reiterate what we have already said (Pet. 33-35) and, following the Government's lead, respectfully refer the court to the brief

[6] Actually, the discussion of this evidence was dicta for, as the court noted (8 F.2d at 212), the defendant was *acquitted* of this particular charge.

on the merits filed by the petitioner in *Gold v. United States, supra,* No. 137 October Term, 1956, pp. 38-47.

---

4. THE PROHIBITION AGAINST POST-VERDICT INQUIRY.

As to the injunction against communicating with jurors after the verdict, the Government argues (Br. 20) that "ordinarily" a juror may not be heard to impeach a verdict. But it fails to recognize that this Court has frequently permitted evidence to be received from jurors to determine the existence of extraneous influences which improperly influenced a verdict. The cases cited in the Petition (p. 37), which establish this proposition,[7] are not even mentioned in the Government's brief.

In any case, the Government does not meet the argument that petitioner should not have been deprived by an order, which it has already conceded was of doubtful propriety (R. 1215-1216; and see Pet. 36, n. 38), of the opportunity of ascertaining the facts so that he might make a showing to obtain appropriate relief (Cf. *Remmer v. United States,* 347 U.S. 227).

CONCLUSION.

This case presents questions of obvious importance and significance to the administration of criminal law in the Federal courts generally, and to the enforcement and application of the "affiliation" provisions of the Taft-

[7] *Mattox v. United States,* 146 U.S. 140; *Holmgren v. United States,* 217 U.S. 507; *Hendrix v. United States,* 219 U.S. 579; and *Woodward v. Leavitt,* 107 Mass. 453.

Hartley Law specifically. It presents issues which have heretofore been accepted for review by this Court but which, for one reason or another, have not yet been decided. These issues are present not only here, but in cases "pending in various districts throughout the country".[8] This Court should issue the writ to review and resolve these questions.

Dated, San Francisco, California,
September 4, 1957.

Respectfully submitted,

RICHARD GLADSTEIN,
GEORGE R. ANDERSEN,
NORMAN LEONARD,
Counsel for Petitioner.

[8] Mr. Justice Clark, in *Gold v. United States*, 352 U.S. 985 at 986, and in *Jencks v. United States*, 353 U.S. 657 at 684.